SRI KELANGKOTA-RAKAN ENGINEERING JV SDN BHD & ANOR

v.

ARAB-MALAYSIAN PRIMA REALTY SDN BHD & ORS

FEDERAL COURT, KUALA LUMPUR
AHMAD FAIRUZ PCA
ABDUL MALEK AHMAD FCJ
MOHTAR ABDULLAH FCJ
[CIVIL APPEAL NO: 02-19-2001(B)]
20 JUNE 2003

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Fact, findings of - Whether court should interfere - Whether concurrent findings of fact by Court of Appeal and High Court did not merit interference by Federal Court*

CIVIL PROCEDURE: *Appeal - Leave to appeal - Leave to appeal granted to Federal Court on sixteen questions - Whether leave ought to have been granted - Whether questions posed came within s. 96(a) Courts of Judicature Act 1964*

The High Court found the appellants in breach of a contract for a sale and purchase of land and decided in favour of the respondents. The Court of Appeal also found in favour of the respondents but set aside two awards of damages granted to the respondents by the High Court. That led to the appellants' appeal and the first respondents' cross-appeal to this court. Leave was granted on sixteen questions posed before this court.

The issues were: (1) whether the courts below erred in their decision; and (2) whether leave ought to have been granted by this court.

Held:
Per Abdul Malek Ahmad FCJ

[1] Based on the judgment of the Court of Appeal and that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact, there was no merit in the appellants' contention that the Court of Appeal erred in its decision. Also, this court was not prepared to interfere with the concurrent findings of facts made by the High Court and the Court of Appeal that it was the appellants who were the guilty party in breach of the contract. (p 364 c-e)

[2] In setting aside the award of damages for loss of profits made against the first appellant, the Court of Appeal had painstakingly decided that the first respondent did not suffer any loss of profits. Similarly, the Court of Appeal had set aside the award of damages for cancellation of sales after finding that the facts and the evidence did not support the grant of the award. (p 364 f-g)

[3] The authorities showed that this court was not prevented from reconsidering the issue of leave again. The questions formulated for determination by this court were not of importance and public advantage. The questions merely relate to a set of facts in the appeal and the application of settled principles of law. Therefore, they did not come within the ambit of s. 96(a) of the Courts of Judicature Act 1964. It followed that there was no necessity for this court to answer the questions posed regardless of the fact that leave to appeal had been granted. (p 369 c-d)

[Appellants' appeal and first respondent's cross-appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Mahkamah Tinggi mendapati bahawa perayu-perayu telah mungkir satu kontrak jual-beli tanah dan memberikan penghakiman yang memihak kepada responden-responden. Mahkamah Rayuan juga memberikan penghakiman yang memihak kepada responden-responden tetapi mengenepikan dua award gantirugi yang diberikan kepada responden-responden oleh Mahkamah Tinggi. Maka rayuan perayu-perayu dan rayuan balas daripada responden pertama ini. Kebenaran untuk merayu telah diberikan atas enam belas soalan-soalan yang dikemukakan di mahkamah ini.

Isu-isunya adalah: (1) sama ada mahkamah-mahkamah bawah tersilap dalam keputusan mereka itu; dan (2) sama ada kebenaran merayu patut dibenarkan oleh mahkamah ini.

Diputuskan:
Oleh Abdul Malek Ahmad FCJ

[1] Berdasarkan penghakiman Mahkamah Rayuan dan bahawa isu yang ditentukan oleh Mahkamah Rayuan dan Mahkamah Tinggi adalah isu fakta, tiada merit dalam hujahan perayu-perayu bahawa Mahkamah Rayuan tersilap dalam keputusannya itu. Juga, mahkamah ini tidak sanggup bercampurtangan dengan pendapat-pendapat fakta yang sama oleh Mahkamah Tinggi dan Mahkamah Rayuan memutuskan bahawa perayu-perayu merupakan pihak bersalah yang mungkir kontrak tersebut.

[2] Dengan mengenepikan award gantirugi untuk kehilangan keuntungan yang diberikan kepada perayu pertama, Mahkamah Rayuan dengan meneliti mendapati bahawa responden pertama tidak mengalami apa-apa kehilangan keuntungan. Juga, Mahkamah Rayuan mengenepikan award gantirugi untuk pembatalan jualan-jualan berkenaan kontrak tersebut selepas mendapati bahawa fakta-fakta dan keterangan tidak menyokong pemberian award itu.

[3] Autoriti-autoriti menunjukkan bahawa mahkamah ini tidak dihalang daripada menimbangkan sekali lagi sama ada kebenaran untuk merayu patut diberikan oleh mahkamah ini. Soalan-soalan yang dikemukakan kepada mahkamah ini tidak penting dan tidak berfaedah kepada orang ramai. Soalan-soalan tersebut hanya berhubung dengan fakta-fakta rayuan dan penggunaan undang-undang prinsip yang sudah ditetapkan. Maka, soalan-soalan itu tidak dalam lingkungan s. 96(a) Akta Mahkamah Kehakiman 1964. Berikutannya, mahkamah ini tidak perlu menjawab soalan-soalan itu walaupun kebenaran merayu telahpun diberikan kepada perayu-perayu.

Rayuan perayu-perayu dan rayuan balas responden pertama ditolak.]

Case(s) referred to:

Arab-Malaysian Prima Realty Sdn Bhd v. Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors [2000] 2 CLJ 632 HC ***(refd)***

Baldota Brothers v. Libra Mining Works AIR [1961] 100 ***(refd)***

Capital Insurance Bhd v. Asiah Abdul Manap & Anor [2000] 4 CLJ 1 FC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Idris Hj Mohamed Amin v. Ng Ah Siew [1935] Vol IV FMSR 257 ***(refd)***

James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796 ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 ***(refd)***

L Schuler AG v. Wickman Machine Tool Sales Ltd [1973] 2 All ER 39 ***(refd)***

Lim Geak Liang v. East West UMI Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***

Manks v. Whiteley [1912] 1 Ch 735 ***(refd)***

Mohamed Isa & Ors v. Abdul Karim & Ors [1970] 2 MLJ 165 ***(refd)***

Mukhlal Singh & Anor v. Kishuni Singh & Ors AIR [1931] Vol 18 PC 22(1) ***(refd)***

Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***

Raphael Pura v. Insas Bhd & Anor [2003] 1 CLJ 61 FC ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***

The Hancock Family Memorial Foundation Ltd & Anor v. Porteous & Anor (2000 201 CLR 347) ***(refd)***

The Minister for Human Resources v. Thong Chin Yoong And Another Appeal [2001] 3 CLJ 933 FC ***(refd)***

Toronto Railway Company v. Corporation of the City of Toronto [1920] AC 426 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 78, 96(a)

For the appellants - KS Narayanan (Logan Sabapathy, A Vishnu Kumar & Tharminder Singh); M/s Logan Sabapathy & Co
For the 1st respondent - Ahmad Moosdeen (P Paramjothy); M/s Chan, Moosdeen & Partners
For the 2nd-8th respondents - K Anantham (Wong Chee Lin); M/s Skrine & Co

[Appeal from Court of Appeal, Civil Appeal No: B-02-526-2000]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malek Ahmad FCJ:
We heard this appeal on 21 and 22 January 2002 but reserved judgment to a date to be fixed. The onerous task of preparing the grounds of judgment, based on thirty-four volumes of the appeal records and numerous bundles of documents, authorities and affidavits, was initially assigned to my learned brother Mohtar Abdullah FCJ who was subsequently admitted to hospital on 5 August 2002 and since he is still being hospitalised, the matter had been reassigned to me on 25 April 2003. Hence this unavoidable delay.

Leave to appeal had been granted by this court (Wan Adnan Ismail PCA, Ahmad Fairuz Sheikh Abdul Halim CJM and Haidar Mohd. Noor FCJ) on 10 October 2001 on sixteen questions as set out below:

1a. In the event an interpretation is advanced and/or reliance is placed on documents that have been challenged on grounds of or analogous to that of "false label" and/or "sham documents", is there any place for the application of principles on evidential restrictions that would otherwise apply to common case of disputed interpretation on expressly recognised contractual documents.

1b. In relation to such "false label" and/or "sham documents", are the terms contained in such documents to be held as automatically void in its entirety or is it still incumbent on the Court to determine the terms of the "true relationship or arrangement" arising therefrom, whether these terms are in part to be derived from the challenged documents or otherwise.

2a. When a claim is grounded in contract and defended on common law contract reasons or grounds (as opposed to pure equitable grounds) is there scope to deprive the defendants of their defence by relying on and applying against them equitable principles and/or considerations.

2b. In any event and in relation to a claim involving relief of an equitable type, whether it is a proper test and if so to what extent for the application of equitable principles and/or considerations to be principally directed towards or obtained from an examination of the defence's case and/or conduct.

3a. Whether the aforesaid relevant principles as set out in L. Schuler AG are to be applied only to determine whether obligations are to be construed as conditions or mere warranties.

3b. Whether and if so, to what extent, can the Court further resort to and apply the said principles (as set out in the said L. Schuler AG) to a case when there exists express provisions to cover "any default" and further express provisions to enable termination upon such default.

4a. In quasi regulated commercial contractual activity in the form of construction of infrastructure, is it open to the Court to grant declarations of status in favour of third parties who have not been clothed with recognition by such authorities.

4b. In negotiated commercial contractual documents, what is the proper test to be applied and the consequent proper threshold of proof and/or evidence required for an implication to arise from such documents.

5a. Whether it is a correct test of discretionary relief arising under contract to state that such discretionary relief is available as a matter of course to an innocent party.

5b. Whether it is a correct test of an appellate court to decline a review of discretionary relief arising under contract merely on account that such discretionary relief remains the discretion of the trial judge.

6a. Whether there is scope to consider compensation and if so, to what extent when the areas to which the alleged defective works refer have been surrendered to and accepted by the local authorities.

6b. Whether there is a scope to consider compensation and if so, to what extent, when the claimant is not clothed with approvals to carry out any other infrastructure works, whether by way of rectification or otherwise.

7a. Whether the prescription of a right of possession under a contract of sale of landed property is a prescription of a temporary kind until the event of registration occurs.

7b. Whether a breach of such right of possession is to be recognised as still actionable under contract when there already exist registration of ownership in favour of the claimant.

8. Whether the Court of Appeal accepting in toto the findings of the High Court that the Applicant was in breach of contract to build in accordance with the cross-section diagrams for roads and drains as found in the Layout Plan marked as Exhibit P-11 and that such findings are free of appealable error, misdirected itself for failing to consider and/or address the submission of the Applicant that such findings of the learned High Court Judge was fundamentally flawed in that the said cross-section diagrams in Exhibit P-11 was not part of the Turnkey Contract or the contractual obligations thereunder.

9. Whether on lands meant for roads in a development which are deemed to be surrendered to the relevant Authorities pursuant to Section 136(2)(ii) of the National Land Code, 1965 and the works done by the Applicant on the said surrendered lands being accepted as per the approvals of the said Authorities, can the Court grant damages to the Respondent for rectification works on the said surrendered lands and when, in any event, such rectification works have not obtained the approval of the relevant Authorities.

At the same time, the first respondent was given leave to cross-appeal on the following question:

> Whether the Court of Appeal may reverse an order of the trial judge by assuming evidence not adduced in the trial and which only supports (not contradicts) the trial judge's findings.

Right at the outset of the hearing of this appeal, the learned President of the Court of Appeal, who was the presiding judge, had asked whether he could change his mind as regards the questions posed as, although he was also on the panel for leave, he now had second thoughts as to whether leave should have been given. This was immediately after our learned brother Mohtar Abdullah FCJ inquired whether leave should in fact have been granted in the first place. Learned counsel for the appellants had remarked that where leave had been given, the questions must be answered if the issue remains live.

In the High Court, the first respondent had sued both the appellants for breach of contract and two others for indemnity for the said breach. The two appellants counterclaimed against the first respondent and six other companies who are the second to the fifth and the seventh and eighth respondents. Subsequently, the appellants had in a separate suit filed an action against the first and sixth respondents on the same facts and cause of action as the counterclaim in the earlier suit. The High Court had accordingly consolidated both the actions and the hearing of the interlocutory applications which began on 9 April 1997 ended after the hearing of the full trial on 29 June 2000.

The first appellant was the owner of 400 acres of land known as Kayangan Heights. The land in question was subdivided into 612 bungalow lots of which 235 lots were sold to individual purchasers and a further 372 lots were sold to the respondents. The transaction between the appellants and the respondents were the result of several written agreements the first four of which had been entered into on 5 February 1996.

The first was the sale and purchase agreement wherein the first appellant sold the bungalow lots to the first respondent at RM10.04 per square foot. The second were the seven sale and purchase agreements with seven companies for the sale of the bungalow lots. These seven companies are all nominees of the first respondent and they are the second to the eighth respondents.

The third was the Turnkey Contract under which the first respondent appointed the second appellant as the contractor to carry out the remaining infrastructure works for the land in question for the sum of RM71,372,682. Under this contract, the infrastructure works were to be carried out in accordance with the plans referred to in the schedule to the Turnkey Contract and no amendments to the plan were allowed without the consent of the first respondent.

The fourth was the Master Supplementary Agreement entered into between the appellants on the one part and the first respondent, also representing the other respondents, on the other part and the fifth were the two Supplementary Agreements between the second appellant and the first respondent which varied the Turnkey Contract. The first Supplementary Agreement is dated 18 July 1996.

There is also an indemnity dated 5 February 1996 between the third appellant in the Court of Appeal who is not an appellant here, and Lee Kam Sun of the one part and the first respondent of the other part. Pursuant to this indemnity, the third appellant in the Court of Appeal and Lee Kam Sun agreed to keep the first respondent indemnified against all actions, proceedings, claims, demands, damages, costs and expenses, including but not limited to any claims, actions or proceedings brought by the purchasers of bungalow lots at Kayangan Heights sold by the first appellant or their contractors or their sub-contractors whatever which the first respondent or their representatives may be liable to, or incur by reason of, their entering into the sale agreement with the first appellant and the Turnkey Contract with the second appellant.

Towards completion of the transaction, each side claimed that the other was in breach of the contract. The first respondent alleged that there was an obligation on the part of the second appellant to build roads and other infrastructure works in accordance with the Turnkey Contract. The infrastructure works were indeed carried out but not in accordance with the specifications under the Turnkey Contract. Despite repeated assurances by the appellants that they will rectify the infrastructure works according to the specifications agreed upon, no rectification was done. This resulted in the first respondent terminating the Turnkey Contract and claiming for possession.

The appellants on the other hand alleged that first respondent had defaulted in making payments for the outstanding sum of about RM12 million to the appellants under the Second Supplementary Agreement and sought to repudiate the whole bargain and called for a re-conveyance of the bungalow lots to themselves. The first respondent had stopped the payment upon the wilful refusal of the appellants in carrying out the infrastructure works according to the Turnkey Contract.

In the High Court, it was the first respondent's case that it has fully paid the purchase price to the first appellant but the first appellant had breached the sale and purchase agreement in failing to deliver the title to the first respondent. The first respondent therefore claimed for specific performance and damages from the first appellant and for a declaration that the cumulative effect of the sale and purchase agreement and the Turnkey Contract is that the first appellant has agreed to give the right to continue the development of Kayangan Heights to the first respondent.

Against the second appellant, the first respondent claimed damages for failure to construct the infrastructure works in Kayangan Heights in accordance with the Turnkey Contract. The second appellant did carry out certain infrastructure works which were approved by the local authority but they were not in accordance with the agreements between the parties.

The claim by the other seven respondents was for specific performance of the seven agreements for the delivery of vacant possession of the bungalow lots and for liquidated damages for the late delivery. The seven agreements were terminated by the first appellant.

Before the High Court, the appellants raised the defence that the entire transaction between the respondents and the appellants was purely one for the sale and purchase of the land from the first appellant to the first respondent at RM18 per square foot and that the Turnkey Contract was a mere facade to cloak an attempt by the first respondent to evade the payment of real property gains tax.

The learned High Court judge found the evidence overwhelming against the appellants and granted the following reliefs for the respondents:

(a) substantial damages for breach of contract against the appellants without the first respondent having to pay the outstanding sum under the composite sale agreements including the monies owed under the Turnkey Contract;

(b) specific relief including the handing over of issue documents of title;

(c) sole possession of the project site, to the exclusion of the appellants, with the declaration that the first respondent are the sole developers for the project, in place of the first appellant.

Dissatisfied with that decision, the appellants appealed to the Court of Appeal.

The Court of Appeal (Gopal Sri Ram, Siti Norma Yaacob and Abdul Kadir Sulaiman JJCA) was of the view that the question at issue in the appeal to be whether it was the appellants or the respondents who were in breach of their contractual obligations which question, the Court of Appeal opined, does not involve any novel or difficult point of principle but rather calls for the application of settled principles of law to the particular facts. In doing so, the Court of Appeal held that there were two issues touching upon the relevant agreements.

The first concerns the methodology for the construction of the agreements, in particular, whether they ought to be read individually or together. The second was whether the correspondence exchanged between the parties during the course of negotiations may be looked at as a guide to the interpretation of the agreements in this case. These issues were taken in view of the criticisms levelled by the appellants on the approach of the learned High Court judge.

Learned counsel for the appellants argued that if the learned High Court judge had directed himself accurately on these two issues, he would have found that the Turnkey Contract was a sham and "the real commercial bargain" between the parties was a contract for the sale and purchase of the land at RM18 per square foot and nothing else. In the main, the Court of Appeal agreed with the learned High Court judge that the Turnkey Contract was not a sham.

In addressing the two issues touching on the agreements, the Court of Appeal pronounced as follows:

> The first point is about the reading of the agreements. According to the appellants, the learned judge applied a dual approach to the question of interpretation. They complain that when he construed the agreements, he treated them as separate documents; but that when he came to granting relief to the 7 companies, he read all the agreements together. Encik Narayanan of counsel for the appellants has argued that this duality of approach has resulted in a miscarriage of justice.
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> For the first respondent, Encik Ahmad Moosdeen has argued that the learned judge did not misdirect himself in the manner complained of by the appellants. He and Encik Anantham for the remaining respondents accept that the agreements are to be read together, but that when this is done, the result is of no moment to the appellants.
>
> I have carefully read the judgment of the learned judge but am unable to discover any direction on the point. Nowhere has he said that the four agreements are to be read together. Neither has he said that they ought to be read separately. What is plain is that he directed his mind only to the Sale and Purchase Agreement and the Turnkey Contract. This is because he focused on the appellants' "real commercial bargain" argument ...
>
> In my judgment, there is merit in the appellants' argument that the agreements in this case must be read together. Indeed, as I have said, the respondents make no issue about the point at all. When the agreements are read together, what comes across with sharp clarity is the fact that a breach of any of the terms of one of the agreements triggers a breach of all the agreements. This is achieved by clause 2 of the Master Supplementary Agreement. In other words, all these agreements are to be looked upon as forming part and parcel of one of the same transaction.

reliance being made on *Manks v. Whiteley* [1912] 1 Ch. 735, which has been followed here in *Idris bin Haji Mohamed Amin v. Ng Ah Siew* [1935] Vol. IV FMSR 257 and *Mohamed Isa & Ors. v. Abdul Karim & Ors.* [1970] 2 MLJ 165.

The Court of Appeal went on to state:

> I have said the agreements in this case must be read as forming one transaction. The question then arises: what is that transaction?
>
> According to the appellants if you look at the correspondence exchanged between the parties during negotiations, you will see that it is nothing more than a sale of bungalow lots at RM18 per square foot. According to the respondents, it is much more than that. They say that the appellants had substantial obligations under the Turnkey Contract. It was not pure window dressing. It was a contract that was designed to be acted upon and was acted upon by the parties.

> In the court below, the point did not go beyond the realm of admissibility. In a passage in his judgment following that which I earlier quoted, the learned judge held that the appellants' argument about the "real commercial bargain" offended the parol evidence rule housed in section 92 of the Evidence Act. Having held that the "real commercial bargain" argument was inadmissible, the learned judge proceeded to enforce the terms of the Turnkey Contract. ...
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> That brings me to the question of admissibility. In my judgment, section 92 of the Evidence Act had nothing whatever to do with this case. The judge was in error when he thought that it did. The appellants were not seeking to admit evidence to contradict the terms of the agreements that had been entered into. They wanted the court to see the real transaction behind the facade of the agreements. That this is permissible is settled by high authority ...
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> Parties to a transaction may disguise its true nature and purport by whatever means available to them. Yet, the court will tear away the disguise and reveal to the world at large the true arrangement arrived at between the parties. It is important for reasons of public policy that the court is seised of this power. Were it not so, the law would be lending its aid to enforce pretended and not real obligations.

On the issue whether the correspondence exchanged between the parties during negotiations may be looked at as an aid to the construction of the agreements, the Court of Appeal referred to *Prenn v. Simmonds* [1971] 3 All ER 237 at p. 240 where Lord Wilberforce said:

> By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? ... It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true; the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact ... And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation if that can reasonably be found.

Prenn v. Simmonds (supra) was applied by this court in *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and *Keng Huat Film Co. Sdn Bhd v. Makhanlall (Properties) Pte. Ltd* [1984] 1 MLJ 243. On this point, the finding of the Court of Appeal was:

> Now, I have examined the letters referred to by counsel for the appellants. Some of these are quite useless because, as pointed out by Encik Ahmad Moosdeen, they show the parties altering their respective positions at different stages of the negotiations. New terms were being formulated and amendments were being suggested to some of the existing terms. Therefore, to say that all these letters are admissible would not, in my view be a fair application of the rule in *Prenn v. Simmonds (ibid)* to the fact pattern before us. That, with respect to Encik Narayanan, would amount to admitting evidence of negotiations which is something that section 92 prohibits. But I am prepared to accept that there are in the record provided to us **some** letters that are clearly admissible in support of the appellants' contention that the real commercial bargain between the parties was something other than what is set out in the Turnkey Contract ...
>
> Now, if you look at the later letters and at the final agreements in this case, you will find that the point taken by counsel for the first respondent has been made out. I do not see any point in quoting from all of them. Suffice to say that they show that the price for the Turnkey Contract was amended during negotiations and that there was a necessity for the provision of a bill of quantities in respect of the work undertaken by the appellants under the Turnkey Contract. Further, it is noteworthy that the respondents secured for themselves a very valuable right in the form of an assignment of the mutual covenants that the appellants had obtained from the 235 purchasers to whom the appellants had previously sold bungalow lots. There is therefore much force in the argument of counsel for the first respondent that the Turnkey Contract did in truth and in fact create mutually enforceable legal obligations by which the parties considered themselves to be bound.
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> Now, it must be said in fairness to the respondents that there is abundant evidence, both oral and documentary, showing that the post-agreements conduct of the appellants points to an acceptance on their part that the Turnkey Contract was not a sham but that it created binding obligations. But, is the subsequent conduct of a party admissible to interpret a contract? That question must, I think receive a negative response. Were it otherwise, a contract would mean something today and something else tomorrow. The point has been settled by high authority.

The Court of Appeal further went on to cite *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 at p. 798 where Lord Reid said:

> I must say that I had thought that it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

In *L Schuler AG v. Wickman Machine Tool Sales Ltd.* [1973] 2 All ER 39, the House of Lords propounded the principle that although there was a presumption that, if the word 'condition' was used in a formal contract, it indicated a term of the contract breach of which, however small, gave rise to a right to repudiate, the word would not be given that meaning if such a construction produced a result so unreasonable that the parties could not have intended it, and if there was some other possible and reasonable construction.

Applying the principles enunciated in the above cited case, the Court of Appeal concluded that the court may look at subsequent conduct, not to interpret an agreement, but to prevent parties from asserting that an agreement had a different meaning from the meaning that they had proceeded upon, *albeit* mistakenly, and concluded:

> To sum-up, the judge was wrong in holding that evidence was not admissible to reveal the real commercial bargain between the parties. He was also wrong in not reading all the ten agreements together. But these errors make no difference to the final result upon this part of the case. Even if the judge had done all that was required of him, he would have – as would have any reasonable tribunal properly directing itself – arriving at the conclusion that the Turnkey Contract as drawn up and executed accurately reflected the true commercial bargain between the parties and that there was no other real commercial bargain.
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> The only question therefore, is whether it is the appellants or the first respondent who was in breach of contract. ...
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> I must say at once that an action founded on contract, the issue as to which of the contracting parties is in breach is a question of fact that depends for its resolution upon the facts and circumstances of the particular case. ... Now, the way in which the parties have gone forward on their respective cases makes it plain that each of the contracting parties is blaming the other for not fulfilling its obligations while justifying its own actions. The judge in the court below therefore had before him a typical, run-off-the-mill, case of breach of contract. His function was to examine the grounds of justification advanced by each side with a view to identify the guilty party, ie, the party who acted in breach of contract.
>
> The points of contention between the rival litigants raise two questions. First, was the learned judge right in holding that it was the first and the second appellants who acted in breach of contract? Second, was the learned judge right in awarding the relief that he did? ...

> The evidence led on the question of breach is voluminous. There is a large body of oral evidence accompanied by several thousand of pages of documents. The task of sifting the evidence must have presented an enormous task to the learned judge. But it must be said in fairness to him that he carried out his task as required by law. In other words there was judicial appreciation of the evidence by the learned judge upon the issues that fell for decision.
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> Counsel on both sides took us through the most important areas of the printed and documentary evidence. Having reviewed the material placed before us and having considered the oral and written argument presented before us, I am satisfied that in essence the question that falls to be answered is one of fact ...
>
> In the light of the impression that I have gained from the totality of the evidence, I am satisfied that the learned judge's finding that it was the first and second appellants who were in breach of contract is free from any appealable error. Further, on the facts as found by the learned judge, I am driven to the conclusion that the first respondent was justified in terminating the Turnkey Contract.

The Court of Appeal also considered the issue of acquiescence where the appellants highlighted the fact that the respondents had collected payments from its purchasers on the strength of the infrastructure works carried out by the appellants. Therefore, the appellants contended that it was no longer open for the respondents to complain that the works were not in accordance with the plans. In the light of the finding by the learned trial judge that it was the first and the second appellants who were in breach of their obligations and taking into account all the circumstances of the case, including the conduct of the appellants in failing to obtain the first respondent's consent to the amendments to the relevant plans, the Court of Appeal, however, did not think it just that the appellants should succeed in their plea of acquiescence.

On the termination of the agreements by the appellants, the Court of Appeal, applying the principles in *L Schuler AG*'s case *(supra)*, found as follows:

> When the agreements entered into between the appellants and the respondents are read as a whole, as I think they ought to be, it is apparent that the parties did not envisage that either side could throw up the whole bargain for an insubstantial breach. The appellants had already received about RM141 million from the respondents. All that remained payable was a few million – in the region of about RM12 million under the Second Supplementary Agreement. This works out to be less than 10% of the total sum already received by the appellants. It appears illogical that in a transaction such as this; a transaction involving a sum in excess of RM100 million; that the parties could have intended that the respondents' non-payment of the balance sum, however

paltry, due under one or more of the various agreements would confer upon the appellants the unqualified right to throw up the whole transaction and obtain a re-conveyance unto themselves of the bungalow lots in question. Such a result is wholly unjust and unreasonable. It smacks of punishment. If, of course, that is the only result the parties intended I must fold my arms in abject submission and accept it as precisely what the respondents had accepted. But I do not apprehend the parties to have intended so unreasonable a result. In my judgment, the agreements when read as a whole support the conclusion that the respondents' failure to pay the remaining fractional balance entitles the appellants to sue and recover the unpaid sum. It does not, in my view, entitle them to treat the contractual arrangement with the respondents as being at an end. To put in classical terms, the appellants are entitled to treat the respondents refusal to pay as the breach of a warranty and sue for damages, they are not entitled to treat it as the breach of a condition and to repudiate the bargain altogether.

As far as the relief is concerned, the Court of Appeal said:

First the grant of specific relief against all the first and second appellants and in favour of all the respondents. The fundamental obligation on the part of the appellants was to hand over to the respondents the bungalow lots in question with the infrastructure works completed in accordance with the relevant plans. The respondents' right to have the lots in question with all the appurtenant rights is beyond argument. Specific relief, whether by way of injunction, specific performance or declaration or a combination of these remedies is the usual relief that is granted to an innocent party in an action for breach of contract. The first respondent was therefore entitled to the specific relief granted by the learned judge. Being essentially equitable relief, there is a fairly wide discretion available to the trial judge to determine where the balance of justice lies when making up his mind with the exercise of such discretion unless it is satisfied, *inter alia*, that justice has miscarried. The facts of the present case amply demonstrate an almost wilful refusal on the part of the first and second appellants to adhere to the terms of the bargain they had entered into and for which they had already collected a substantial portion of the contract price. In those circumstances, I find no error in the way in which the learned judge exercised his discretion in granting the different forms of specific relief in this case.

The award of damages for loss of profits made against the first appellant was set aside by the Court of Appeal on the ground that the award was plainly wrong since the first respondent had already obtained orders that gave it the land it was supposed to have under the terms of the transaction in question. Also, there was already an award of damages against the second appellant being the cost of rectification works which would have put the land in the state in which it ought to have been if the contract had been properly performed.

The order of the trial judge for damages for the cancellation of sales occasioned to the first respondent was also set aside by the Court of Appeal on the ground that there was nothing from the evidence to sustain the award.

Apart from the two awards on damages mentioned above, the Court of Appeal affirmed the orders made by the learned trial judge. Hence the appeal and the cross appeal by the appellants and the first respondent respectively.

Notwithstanding the numerous grounds of appeal put forth by the appellants, they essentially contended that the Court of Appeal erred in law in coming to the conclusion, *inter alia*, that the Turnkey Contract was not a sham and in affirming the relief and the award of damages granted against the appellants.

In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact, there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of facts made by the courts below as held by this court in *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405. Therefore, in the final analysis, the fact remains that it was the appellants who were in breach of the agreements. In the premises, the appeal by the appellants should, in our humble view, be dismissed with costs.

Insofar as the cross appeal by the first respondent is concerned, it is our finding that in setting aside the award of damages for loss of profits made against the first appellant, the Court of Appeal had painstakingly examined the facts before coming to the conclusion that there was no question of the first respondent suffering any loss of profits. Similarly, on the award of damages for the cancellation of sales, the Court of Appeal set aside the award after finding that the facts and the evidence did not support the grant of the award. The cross appeal by the respondent should also, in our considered opinion, be dismissed with costs.

As intimated by my learned brothers at the commencement of the hearing of this appeal, a view shared by me when I was reading the appeal record beforehand, could this court not reconsider the point whether leave ought to

have been granted in the first place based on the circumstances in this case? A number of authorities, both local and foreign, seem to indicate that we could.

In *Capital Insurance Berhad v. Asiah binti Abdul Manap & Anor* [2000] 4 CLJ 1, the judgment at pp. 5 and 7 state:

> There is however one interesting point which deserves our consideration. From the chronology of events, on 17 February 2000 an application for leave to appeal against the Court of Appeal decision was granted by this court in which I sat as a panel member. A preliminary objection taken by the respondents that the application was improper was summarily dismissed by the court. In view of leave to appeal having been granted earlier by this court, can the respondents raise here a preliminary objection that this court has no jurisdiction to hear the appeal?
>
> Encik Yusuf Khan for the respondents contended that they can raise the issue of want of jurisdiction at this stage. He reasoned that s. 96 of the Act basically deals with the jurisdiction of the Federal Court to hear appeals from the Court of Appeal upon leave being granted. He submitted that in the present case the Federal Court at the leave stage did not decide the issue of jurisdiction on the merit, but in granting leave to appeal, he said the court considered "the appropriateness of matters raised for appeal becoming the subject of appeal". Hence, since the issue of jurisdiction was not considered by the earlier panel when granting leave to appeal, the respondents are entitled to raise the issue here. Counsel relied on the decision of the Court of Appeal in *Penang Port Commission v. Kanawagi a/l Seperumaniam* [1997] 2 MLJ 300 which held (at p. 302):
>
> > The dismissal of the respondent's application for leave to appeal by the Federal Court could not be taken as a decision of the Federal Court on merit of the issue of jurisdiction of the Court of Appeal because in an application for leave to appeal, the Federal Court considered whether or not there existed the question of law involving public interest.
>
> In our view, there is much force in the submission. Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application. In this regard, we would rely on the decision of Thomson, J in *M Pr Kannappa Chettiar v. LRM Letchumanan Chettiar* [1952] 18 MLJ 188. In an application to the High Court by way of an appeal from the decision of the Rent Assessment Board, the Board refused permission to the appellant to apply to the appropriate court for ejectment of the respondent. It was held that the

High Court has no jurisdiction to entertain appeals from any statutory tribunals unless such jurisdiction is expressly given by the statute. In his judgment, Thomson, J (as he then was) stated (at p. 190):

> I would add that I have considered the question of whether in view of the fact that the point of want of jurisdiction was not taken by either of the parties I should not hold that it has been waived. On such point, however, it seems to be that where there is a complete lack of jurisdiction there can be no question of waiver and that it is the duty of the court to take and deal with the point if it is not raised by the parties. As was said by Viscount Simon, LC, in the case of *Westminster Bank Ltd v. Edwards*:
>
> > A court not only may, but should take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus, an appellate court not only may, but must, take the objection that it has no jurisdiction to hear an appeal if it is apparent that no right to appeal exists. Vaughan Williams, LJ in *Norwich Corporation v. Norwich Electric Tramways Co Ltd*, formulated the proposition thus:
> >
> > > If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself.

Earlier, at pp. 4-5, the court had said:

> Accordingly, after considering the background facts and the authorities, we agree with counsel for the respondents that the present appeal is from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the court held that the appeal record and the supplementary appeal record were defective for non-compliance of Rules 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. As was stated in *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485 it is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies. Thus, it is patently clear that the subject-matter of the present appeal is not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction.

A similar objection was made very recently in *Raphael Pura v. Insas Berhad & Anor* [2003] 1 CLJ 61 where the majority judgment dealt with the point in the following fashion at p. 96:

> The first question that arises from this submission is whether, the leave having been granted by this court and now that this court (this panel) is constituted to hear the appeal, this court (this panel) should allow the respondents to reopen the issue whether the leave should have been granted or not.
>
> Generally speaking, it should not. The issue has been decided by this court. It is *res judicata*. A party should not be given a second bite of the cherry. A new panel of this court should not be reversing the decision of the earlier panel of the same court. There should be consistency of the judgment in the court.
>
> However, where the granting of the leave is challenged on the ground of lack of jurisdiction, this court has held that the granting of the leave to appeal to this court may still be challenged even at the hearing of the appeal.

Consequently, after examining the facts of the matter, this court in that case held that the question posed did not relate to the facts and that it would be purely an academic exercise if the court were to answer the question posed.

In *The Minister for Human Resources v. Thong Chin Yoong (And Another Appeal)* [2001] 3 CLJ 933, this court declined to answer the question posed as it did not fall within the ambit of s. 96(a) of the Courts of Judicature Act 1964 (hereinafter "the CJA"). It held that the question as framed seems to indicate that it is a point of law but neither the High Court nor the Court of Appeal had considered the merits of the respondent's representations. Both the courts below, however, had not taken into consideration the issue of the respondent's suspension which issue involved mixed questions of law and fact for the Industrial Court, which was the proper forum, to decide. If need be thereafter, it would have to go to the various levels of the courts in the judicial system. As such, at that point in time, this court was of the view that it was asked to consider an issue which had not been determined by all the courts below.

In *Baldota Brothers v. Libra Mining Works AIR* [1961] 100, it was held:

> There is no distinction in the scope of the exercise of the power under Article 136 (of the Constitution of India) at the stage of application for special leave and at the stage when the leave is finally disposed of. It is open to the Court to question the propriety of the leave granted at the time of the hearing of the appeal.
>
> No respondent will be aggrieved by such procedure; the appellant also cannot complain as he adopted the procedure with open eyes and therefore must take such consequences as follow from invoking the special jurisdiction of this Court under Article 136. There is no question of one division bench sitting

> in judgment over another, the same court hears the same matter at different stages, one for the limited purpose of granting special leave, when only the test of *prima facie* arguable point is applied and the other for the final disposal when the question raised is considered in the presence of both the parties and when it is in possession of all the relevant material. Therefore unless the Supreme Court at the hearing of the appeal is satisfied that the appeal raises a question that justifies the exercise of its discretionary jurisdiction under Article 136 the appeal is liable to be dismissed without further investigation into the merits of the case.

In *Mukhlal Singh and Another v. Kishuni Singh and Others* AIR [1931] Vol. 18 Privy Council 22(1), it was the finding of the Privy Council that the fact that a special leave to appeal was granted on an *ex parte* application does not preclude the Board when true facts are brought before it from going into the question whether the appeal is competent or not. It must be observed that in that case, the special leave granted was based on an *ex parte* application, unlike in our case.

In *Toronto Railway Company v. Corporation of the City of Toronto* [1920] AC 426 an appeal lies, by special leave to His Majesty in Council, from an order of the Board of Railway Commissioners for Canada, but having regard to the nature of the functions of that Board and the rights of appeal given by the Railway Act, leave should be granted cautiously and only under special circumstances. It was held that it is incumbent upon the petitioners in any case in which special leave is applied for to see that the facts are correctly brought to the notice of the Judicial Committee, and if at any stage it is found that there has been failure to do so, the leave may be rescinded.

Of particular interest is the Australian case of *The Hancock Family Memorial Foundation Limited and Another v. Porteous and Another* [2000 201 CLR 347) where it was held that:

> Unless the applicant states candidly, concisely and comprehensively the material facts as found in the lower courts, whether they are favourable or unfavourable to the applicant, this Court is likely to be misled as to the issues really arising in the application for special leave to appeal. Similarly, if a special leave question does not arise unless some issue of fact or law is first determined in the applicant's favour it is misleading to state that special leave question without indicating that these anterior issues have first to be determined.

The common feature in the *Capital Berhad*'s case *(supra)*, the *Raphael Pura* case *(supra)* and *The Minister for Human Resources*' case *(supra)* is that the merits had not been dealt with in the Court of Appeal. Further, after leave had been granted on those cases, a preliminary objection had been raised at the appeal stage to establish the point that leave should not have been given. All three appeals had been dismissed with costs without going into the merits when this court upheld the preliminary objections. The situation is somewhat different here as both the High Court and the Court of Appeal had actually dealt with the matter on the merits. It was not simply a matter of a lack of jurisdiction. Further, no preliminary objection had been raised at the appeal stage before us against the granting of the leave.

Despite that, in the light of the authorities, we would hold that we are not prevented from reconsidering the issue of leave again. Coming back to the questions formulated for determination by this court, it is our view that the questions do not involve a question of importance upon which further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s. 96(a) of the CJA and, therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

My learned brother Ahmad Fairuz Sheikh Abdul Halim, now the Chief Justice, has seen this judgment in draft and has expressed his agreement with it. In view of my learned brother Mohtar Abdullah FCJ's inability to act, this judgment is given pursuant to s. 78 of the CJA.

The appeal and cross appeal are, therefore, dismissed with costs. The deposit for the appeal is to go to the respondents to the account of taxed costs.